FILED
OCT 14 1975
MICHAEL RODAK, JR., CLERK

# Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-412

PHILLIPS PETROLEUM COMPANY, *Petitioner,*

v.

J. H. ADAMS, ET AL, RIVERVIEW GAS COMPRESSION COMPANY, ET AL, and FIRST NATIONAL BANK OF BORGER, *Respondents.*

## BRIEF FOR RESPONDENTS IN OPPOSITION

R. C. HAMILTON
KOLANDER, TEMPLETON & HAMILTON
1800 American National Bank Building
Amarillo, Texas 79101

*Attorneys for Respondents J. H. Adams, et al, and First National Bank of Borger*

ROBERT J. HEARON, JR.
GRAVES, DOUGHERTY, HEARON, MOODY & GARWOOD
P. O. Box 98
Austin, Texas 78767

PAUL H. SMITH
COX, SMITH, SMITH, HALE & GUENTHER
500 National Bank of Commerce Building
San Antonio, Texas 78205

MASTON C. COURTNEY
CULTON, MORGAN, BRITAIN & WHITE
P. O. Box 189
Amarillo, Texas 79105

*Attorneys for Respondents Riverview Gas Compression Company, et al*

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

## INDEX


| | Page |
|---|---|
| Opinions Below | 1 |
| Jurisdiction | 1 |
| Statutes and Regulations Involved | 2 |
| Questions Presented | 2 |
| Statement of the Case | 2-5 |
| The Petition Should Be Denied | 6 |
| Argument | 7-21 |
| The Statute Involved | 7 |
| The Cases Involved | |
| A. The Texas Cases | 9-13 |
| B. The Federal Cases—No Conflict Within the Circuit | 14-16 |
| C. The Kishi Case | 16-21 |
| D. Rules of Decision Act | 21 |
| Conclusion | 22 |


## LIST OF AUTHORITIES

Cases:


*Allied Building Credits, Inc.* v. *Grogan Builders Supply Co.*, 365 SW2 692 (Tex. Civ. App., Houston, 1963, writ ref'd n.r.e.) ..... 12, 13

*American Surety Co.* v. *Shaw*, 69 SW2 47 (Tex.Comm. App., 1934) ..... 9

*Ashland Oil and Refining Company* v. *Staates, Inc.*, 271 F. Supp. 571 (D. Kan., 1967) ..... 18

*City of El Paso* v. *Nicholson*, 361 SW2 415 (Tex. Civ. App., El Paso. 1962, writ ref'd n.r.e) ..... 12

*City of Texarkana, Texas*, v. *Arkansas Louisiana Gas Company*, 118 F2 289 (5th Cir. 1941) ..... 14, 15, 16

Page

*Erie Railroad Company* v. *Tompkins*, 304 U.S. 64 .... 21
*Federal Crude Oil Co.* v. *Yount-Lee Oil Co., et al*, 1932, 122 Tex. 21, 52 SW2 56 ..... 8
*Federal Life Insurance Company of Chicago* v. *Kriton*, (1923) 112 Tex. 532, 249 SW 193 .....15, 16
*G&W Marine, Inc.* v. *Morris*, 471 SW2 644 (Tex. Civ. App., Beaumont, 1971, writ ref'd n.r.e.) ..... 9
*Hillsborough* v. *Cromwell*, 326 U.S. 620 ..... 21
*Hunter* v. *Whitaker & Washington*, 230 SW 1096 (Tex. Civ. App., San Antonio, 1921, err. ref.) ..... 8
*Imperial Irr. Co.* v. *Jayne*, 1911, 104 Tex. 394, 138 SW 575 ..... 8
*International Traveler's Ass'n.* v. *Bettis*, 120 Tex. 67, 37 SW2 1040 (1931) ..... 20
*Kishi* v. *Humble Oil and Refining Company*, 10 F2 356 (5th Cir., 1926) .....16, 17, 18, 19, 20, 21
*Phillips Petroleum Company* v. *Adams*, 513 F2 355.... 3, 5, 16, 19
*Spears* v. *City of San Antonio*, 1920 110 Tex. 618, 223 SW 166 ..... 9
*State* v. *Hatcher*, 52 SW2 794 (Tex. Civ. App., Austin, 1932) 81 SW2 499 ..... 20
*Texas & P. R. Co.* v. *Railroad Commission of Texas*, 1912, 105 Tex. 386, 150 SW 878 ..... 7, 8
*Treon* v. *Richter*, 265 SW2 125 (Tex. Civ. App., San Antonio, 1954, writ ref'd n.r.e.).....9, 10, 11, 14
*Watson Co.* v. *Shaw*, 47 SW2 474 (Tex. Civ. App., Dallas, 1932) ..... 9

STATUTES:

Rules of Decision Act, 28 U.S.C.A. § 1652 ..... 21

Texas Revised Civil Statutes Annotated:

Art. 10 ..... 8
Art. 1287-1 .. ..... 10
Art. 5069-1.01 and 3.01 ..... 7

28 U.S.C. § 1254(1) ..... 1
U.S. Sup. Ct. Rule 19, 28 U.S.C.A. ..... 6

ADMINISTRATIVE ORDERS:

Hugoton-Anadarko Area Rate Case, Opinion 586, 44 FPC 761 (1970) .....3, 4, 7, 13, 17, 18

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1975

---

No. 75-412

---

PHILLIPS PETROLEUM COMPANY, *Petitioner,*

v.

J. H. ADAMS, ET AL, RIVERVIEW GAS COMPRESSION COMPANY, ET AL, and FIRST NATIONAL BANK OF BORGER, *Respondents.*

---

## BRIEF FOR RESPONDENTS IN OPPOSITION

---

### OPINIONS BELOW

Reference to the official and unofficial reports of the opinions delivered in the Courts below correctly appear at pages one and two of the petition. (Pet. 1-2)

### JURISDICTION

The asserted jurisdiction is under 28 U.S.C. § 1254 (1).

## STATUTES AND REGULATIONS INVOLVED

The statutes and regulations which the case involves are contained in the petition at page three (Pet. 3) and the appendix thereto beginning at page 1a.

## QUESTIONS PRESENTED

The "questions presented" set forth in the petition (Pet. 2) are based on the erroneous assumption that the Texas interest statutes and decisions do not permit recovery of interest for the *use* of money prior to the final maturity of the principal debt.

The Texas interest statute expressly provides for the recovery of interest for the *use* of money (as well as for the *detention* of money) and the only state Court decision and the only previous decision by the Court of Appeals for the Fifth Circuit which involved a claim of interest for the *use* of money prior to the final maturity of the principal debt are in harmony with and precisely followed by the Court of Appeals in these cases.

## STATEMENT OF THE CASE

The "statement of the case" set forth in the petition (Pet. 3-7) is correct for the most part but omits certain facts which Respondents consider essential for a complete understanding of the cases.

During all the time material, the casinghead gas produced from Respondents' leases was sold to Petitioner (hereinafter referred to as "Phillips") under *percent of proceeds* contracts. Although at some point in time such gas was sold under *flat rate* contracts, the principal fund upon which Respondents are entitled to interest accrued under the percent of proceeds contracts. All of the pertinent contracts are in substantially the

same form as the contract at pages 186-193 of the printed appendix filed in the Riverview case in the Court of Appeals.

Under the pricing provisions of the contracts, Phillips was obligated to account to Respondents at a rate determined, in part, by multiplying the volume of gas produced from Respondents' leases by a factor equal to a percent of the weighted average price received by Phillips and its subsidiaries from the sale to others of gas within the Panhandle Field of Texas.

The payment provision of the contracts required that payment for all gas delivered each month be made not later than the last day of the succeeding month.

Although the contracts are made subject to all valid statutes and rules and regulations of any duly constituted federal or state regulatory body having jurisdiction, the only contract provision giving Phillips the right to withhold any payment was a circumstance in which Respondents' *title to the gas* is questioned or involved in litigation. It is undisputed that title to Respondents' gas has never been in question nor involved in litigation, within the meaning of the contracts. Phillips' contractual defense to liability for interest was denied by the Court of Appeals. *Phillips Petroleum Company* v. *Adams,* 513 F2 355 (369).

Between June 7, 1954, the date the Federal Power Commission (hereinafter called "FPC") began regulation of the wellhead price of natural gas sold in interstate commerce, and October 28, 1972, the date that Federal Power Commission Opinion 586 became final, Phillips sold gas from the Panhandle Field of Texas to third parties, and at rates, some of which, were in excess of the then applicable area ceiling rates

established by the FPC. Such higher rates were put into effect by Phillips after filing applications with the FPC to increase the price and were thereafter permitted by the Commission, subject to Phillips' filing of a corporate undertaking to insure that any part of the increased rate in excess of the just and reasonable rate as finally determined by the FPC would be refunded to Phillips' purchasers, together with interest at the rate of seven percent (7%), per annum.

During the time material to these cases, Phillips accounted to Respondents on the basis of the then approved FPC ceiling prices. The price differential between Phillips' then effective contract rate and the FPC ceiling price, was retained by Phillips. There accumulated a substantial sum of money which may be characterized as suspense funds which, insofar as it was attributable to the contract price payable to Respondents for gas produced from their leases, would ultimately belong, in its entirety, either to Respondents or to interstate purchasers of gas from Phillips. Phillips has never owned or been entitled to any interest in the suspense funds which represent a part of the price payable to Respondents under the contracts for gas produced from their leases. Notwithstanding, Phillips has held such funds to secure the refund obligations under its corporate undertaking filed with the FPC.

After FPC Order 586 became final, Phillips divided the suspense funds, representing a part of the contract price for Respondents' gas into two catagories: (i) *refundable monies* and (ii) *sustainable monies.* The refundable monies were ultimately refunded to Phillips' third party, interstate purchasers, together with in-

terest at the rate of seven percent (7%) per annum as required by the FPC's regulations. Phillips paid the sustainable monies into the registry of the United States District Court for the Northern District of Texas, Amarillo Division, when a dispute over ownership of the funds occurred but refused to pay statutory interest for the use of the sustainable monies.

The sustainable monies represent the principal amount upon which Respondents are entitled to statutory interest. It is undisputed and the Court of Appeals, in the *Adams Case* 513 F2 355 (366) noted that "In this case Phillips collected money over a period of several years which would ultimately be refunded to its customers or paid to its suppliers; in no event did Phillips ever have the slightest prospect of entitlement to the entire principal sum of suspense money here in question. This money was not placed in an escrow account, nor was it paid to the suppliers as it accumulated, subject to refund, with interest—a course of action followed by Phillips in other instances . . . instead, burdened with the knowledge that it might have to refund some or all of the funds to its customers at seven percent (7%) interest, Phillips placed the suspense money in its general account and used it, presumably, in the manner most advantageous to the corporate fisc."

Correctly interpreting the Texas interest statute and in complete harmony with the only state Court decision and prior decisions by the Fifth Circuit Court of Appeals, the Court of Appeals held that Phillips is liable to Respondents for the use of the principal sum of money, at the legal rate of six percent (6%) per annum, computed month by month as the same accrued.

## THE PETITION SHOULD BE DENIED

Phillips misinterprets the Texas interest statute and misapprehends the case law thereunder relating to its liability for the *use* of Respondents' money as opposed to *detention* of money.

The state Court decisions relied upon by Phillips and the prior decision of the Fifth Circuit which it claims is in conflict with this case do not involve claims of interest for the *use* of money and are distinguishable both factually and on applied legal principle.

Phillips also makes much of the circumstance that it may be liable to others in similar cases now on file or yet to be filed. (Pet. 7-9). If this is true, then it will follow in such other cases, as in this case, that its liability is based upon the elemental equitable principle that Phillips should not be able to use someone else's money as it pleases, for many years, enjoying considerable benefit therefrom and then pay nothing for the use of the money.

The question of Phillips' liability for interest for the use of the principal fund has been fully ventilated in the Court of Appeals and decided in harmony with the Texas interest statute and the only prior cases, state or federal, involving a claim for interest for the *use* of money.

The petition does not state special and important reasons why this Court in the exercise of sound judicial discretion should grant a writ. U.S. Sup. Ct. Rule 19, 28 U.S.C.A. Therefore, the petition should be denied.

## ARGUMENT

The facts of these cases are undisputed; cardinal among them is the fact that for many years Phillips has had the use of Respondents' money and has refused to compensate Respondents for that use upon the theory that any liability for interest for *use* could not arise prior to the time that Federal Power Commission Order 586 became final on October 28, 1972. *Hugoton-Anadarko Area Rate Case,* Opinion 586, 44 FPC 761 (1970).

## THE STATUTE INVOLVED

The Texas interest statute defines interest as "the compensation allowed by law for the use or forbearance or detention of money . . ." Tex. Rev. Civ. Stat. Ann. Art. 5069-1.01 (Page 1a of the appendix to the petition).

Article 5069-1.03 provides "When no specific rate of interest is agreed upon by the parties, interest at the rate of six percent per annum shall be allowed on all written contracts ascertaining the sum payable, from and after the time when the sum is due and payable . . ."

The statute, on its face, evidences the legislature's intent to provide for the recovery of interest in three separate instances—for the *use* or forbearance or detention of money. This is apparent from the fact that the three events giving rise to recovery of interest are stated in the disjunctive.

On of the primary and settled rules of statutory construction is that words in common use, when contained in a statute, will be read according to their natural, ordinary, and popular meaning. *Texas & P. R. Co.* v.

*Railroad Commission of Texas,* 1912, 105 Tex. 386, 150 SW 878, 880. The legislature has sanctioned this rule. Tex. Rev. Civ. Stat. Ann. Art. 10 provides in part: "The ordinary signification shall be applied to words, except words of art or words connected with a particular trade or subject matter . . . "; and when the legislature defines a word or groups of words, which it has power to do, the definition, if clear and unambiguous, is binding on the Courts as an expression of the legislative intent. *Federal Crude Oil Co.* v. *Yount-Lee Oil Co., et al,* 1932, 122 Tex. 21, 52 SW2 56, 60.

To give the Texas interest statute the interpretation urged by Phillips (that no interest for the use of money is recoverable until the principal sum is due and payable) would nullify the obvious intent of the legislature and effectively remove from the definition of interest the *compensation for the use of money.* If interest were not recoverable until the principal sum is finally due and payable, but unpaid; then the effect of such a construction is to allow recovery of interest only after the sum payable is detained.

Such a construction would make one-third of the interest statute inoperative and an absurdity. The Court will never adopt a construction that will make the statute absurd or ridiculous, *Hunter* v. *Whitaker & Washington,* 230 SW 1096, 1097, (Tex. Civ. App. San Antonio, 1921, err. ref.) and where the statute is open to two constructions, one of which will effectuate the legislative intent and purpose and make the act operative, whereas the other will defeat that intent and purpose and render it inoperative; the former construction will be adopted. *Imperial Irr. Co.* v. *Jayne,* 1911, 104 Tex. 394, 138 SW 575, 582. Courts ought not to interpret laws so as to nullify or impair them when their lan-

guage reasonably admits of different meaning. *Spears* v. *City of San Antonio,* 1920, 110 Tex. 618, 223 SW 166, 169.

In granting recovery of interest to Respondents in these cases, the Court of Appeals has followed the clear mandate of the Texas Legislature and correctly interpreted the interest statute which plainly provides for the recovery of interest for the use of money.

## THE CASES INVOLVED

### (A) The Texas Cases:

Phillips relies on two Texas cases, *Watson Co.* v. *Shaw,* 47 SW2 474 (Tex.Civ.App., Dallas, 1932) reversed on other grounds in *American Surety Co.* v. *Shaw,* 69 SW2 47 (Tex. Comm. App. 1934) and *G&W Marine, Inc.* v. *Morris,* 471 SW2 644 (Tex. Civ. App., Beaumont, 1971, writ refd. n.r.e.) in support of the proposition that Texas Courts have consistently held that interest not be allowed for the period prior to when the debt became due and payable. (Pet. 11) Both cases involve recovery of interest for the *detention* of money as opposed to *use.* It is fundamental in such a case, that since there can be no detention of funds prior to the time they become due and payable, no interst would be allowed until such detention occurred. Neither of the two cases relied on by Phillips is controlling in these cases on the question of interest for the use of money.

In these cases, the Court of Appeals has cited at least one Texas case which stands in direct opposition to the argument of Phillips. *Treon* v. *Richter,* 265 SW2 125 (Tex.Civ.App., San Antonio, 1954, writ refd. n.r.e.) The Plaintiff in the Treon case had made a contract to sell the Defendant a field of corn. The suit was brought

under the Texas Agricultural Protective Act, Tex.Rev. Civ.Stat. Art. 1287-1 *et sic,* which makes it the duty of the dealer to reduce the contract to writing and furnish the seller a copy. The act further provides that the dealer shall have thirty (30) days after delivery within which to pay for the corn. The contract was entered into on May 24, 1950, and harvest was to begin on May 26, 1950. The Court noted that when the contract was made, constructive possession was given to the Defendant and "there is nothing to indicate any payment was to be made until after the harvest was completed. Under such circumstances Treon had thirty (30) days after he had harvested the corn to make payment and the contract does not call for a cash transaction." (Page 126) In this truncated opinion the Court held "the Court also properly allowed interest at the rate of 6% from May 26, 1950, as a matter of law . . ." *Treon* v. *Richter, ibid,* 265 SW2 125 (126). The obvious intent of the Court was to allow the recovery of interest from and after the time the Defendant, Treon, had physical possession and use of the corn or the value thereof; and the Plaintiff's recovery of interest was not limited to the period after the debt became due and payable, which by statute was thirty (30) days after delivery.

In its petition (Pet. 12) Phillips criticizes the Treon case and attacks its value as controlling precedent in these cases for the reason that, by Phillips' interpretation, the case is one involving the recovery of interest *as damages.* Phillips must necessarily employ some literary license to construe the Court's opinion in the Treon case as a suit for interest as damages. This is apparently the result of the circumstance that the cases cited in support of the Court's judgment for in-

terest are *interest as damage cases.* Respondents take a different view of the Treon case. Although the contract between the parties had not been reduced to writing, the Court in effect held that the Agricultural Protective Act had *written* the parties a contract and that the Defendant could not fail to do that which the act required of him (reduce the agreement to writing) and then plead his own neglect or failure as a reason for escaping liability. The opinion in the Treon case does not indicate whether interest was allowed as damages or as compensation for the use of money. The recovery would be appropriate in either case, and it requires no more literary license than Phillips has employed to conclude that the Court allowed recovery of *statutory interest* on the contract which the legislature had written for the parties.

It is difficult for Respondents to understand how Phillips can, in good grace, attack the Treon case as controlling precedent in these cases for no more reason than that it is an *interest as damages* case and at the same time attempt to advance its basic thesis that "the Texas Courts have consistently held that interest not be awarded for the period prior to when the debt became due and payable" (Pet. 11), on the strength of cases which, without exception, involve *interest for the detention of money.* In any event, and whether the Treon case be given the construction contended for by Phillips or not, it still stands, unreversed and as the law in Texas, that a Court in a proper case, contrary to Phillips' contention, may award the recovery of interest prior to the time the debt becomes due and payable.

The distinction which the Texas Courts make between the time interest commences to run in cases involving *detention* of money as opposed to *use* of money

is dramatically illustrated in *City of El Paso* v. *Nicholson,* 361 SW2 415 (Tex.Civ.App., El Paso, 1962, writ refd. n.r.e.) In the Nicholson case, money belonging to the Plaintiff was wrongfully seized by the El Paso Police Department in a gambling raid on January 6, 1958. On January 16, 1958, the money was taken from the police officer by a city alderman and turned over to the city comptroller and deposited by him in the general fund in the Miscellaneous Revenue Account. In holding that the Plaintiff was entitled to recover interest for the use of his money from January 16, 1958, to the date of judgment, the Court of Civil Appeals held that "Up until the money was taken from the police, it was a police action and it had not been determined in any way that the money had been illegally taken; but on January 16, the City of El Paso received this money and put it to use, apparently, as it was put into the General Fund. We think interest, therefore, is proper and allowable, not as a punitive measure, but merely because the city had the use of this sum of money by virtue of the action of the alderman . . ." What the Court is apparently saying is that no interest would accrue for the *detention* of the Plaintiff's money until it had been judicially determined that the taking of the money was illegal, and upon such determination the principal debt would then become *due and payable;* however, the time when the principal debt became *due and payable* was not a concern of the Court once the city took possession of the money, and used it for its general revenue purposes.

Another case relied upon by Phillips is *Allied Building Credits, Inc.* v. *Grogan Builders Supply Co.,* 365 SW2 692, (Tex.Civ.App., Houston, 1963, writ refd. n.r.e.). The facts in this case involved a situation where

Grogan sold notes and security therefor to Allied on a discounted basis and a dealer reserve account was established pursuant to the provisions of their agreement. Upon termination of their overall agreement, Grogan sued for an accounting of the reserve account together with interest, apparently for the detention of Grogan's funds since there is no evidence in the case that there was any use made of the funds by Allied. Prior to the date on which it was determined that Grogan was entitled to payment from the reserve account, Grogan became subject to a Federal tax lien so that Allied, which was served with such lien, could not make payment to Grogan with impunity until the tax lien was released. In this case the Court allowed interest only after the date the tax lien was released. On the basis of the Grogan case, Phillips argues that no interest could accrue to Respondents between October 28, 1973, (the date that FPC Order 586 became final) and the date Phillips paid the principal amount into the registry of the Court, because the ownership of the principal fund was in dispute during that period of time. Again, it is clear that the Grogan case is no authority for the reason that it involves an attempt to recover interest for money wrongfully detained and is not a case involving the question of the parties' right to interest for the use of their money. The Grogan case, in essence, stands for the proposition that there can be no *wrongful detention* while the ownership of the principal sum is in dispute; and since interest for the detention of money is not recoverable until it becomes due and payable, the determination of *due and payable* must await a final resolution of the adverse claim.

**(B) The Federal Cases—No Conflict Within the Circuit.**

Again, it is difficult for Respondents to comprehend how Phillips will complain in one instance because the Court of Appeals follows a Texas case allowing the recovery of interest before the principal sum became due and payable, Treon case *supra,* (for the reason that it is an *interest as damages case*) and in the same petition find fault with the circumstance that the Court of Appeals did not cite, let alone follow, one of its prior decisions, *City of Texarkana, Texas,* v. *Arkansas Louisiana Gas Company,* 118 F2 289 (5th Cir. 1941) which denied *interest as damages* prior to the time the principal sum became due and payable. If you accept Phillips' interpretation of the Treon case, then it must follow that the Texarkana case is in conflict with it and must yield. We will not unduly lengthen this brief in opposition with a further factual statement of the Texarkana case. The Court of Appeals held that no statute awards interest in that case because the statute "refers to debts liquidated by a writing, and applies only where the amount due can be ascertained from the writing alone . . . the franchise here liquidates nothing. It is the basis of the demand sought to be enforced, but it ascertains no amount as due. Much extraneous evidence is necessary. The statute does not apply." (Page 291). Since the Court had concluded that no statute awards interest and no interest was promised, the sole question involved in the Texarkana case was whether any interest was due *as damages for the detention of money* (City of Texarkana case *supra,* 118 F2 289 (294). The Court of Appeals noted that the Texas Courts recognize the difference between interest contracted or required by statute and interest allowed as damages for the detention of money. The Court then

denied interest on the refunds claimed by the City of Texarkana, Texas, prior to the time that the utility rates were finally established in Texarkana, Arkansas, for the simple reason that under its contract with the utility company an involuntarily lower rate was not to be put into effect in Texas until it was finally established in Arkansas. That date would determine *due and payable* and the date after which interest as damages for money wrongfully detained would be recoverable.

*City of Texarkana* v. *Arkansas Louisiana Gas Company, ibid.,* is distinguishable on its facts and applied legal principles and was not considered by the Court of Appeals to be controlling in these cases for the reason that it involves the question of interest recoverable *as damages for money wrongfully detained* and does not involve the question of interest for the *use* of money. The case is also factually different in that the contract in the Texarkana case allowed the utility to collect the higher rate, without interest, until the involuntary lower rate was finally established in Arkansas. The Texarkana case should not be considered controlling precedent for the further reason that the Court of Appeals concluded that no statute awards interest because the franchise liquidated nothing. This holding is in conflict with a holding by the Supreme Court of Texas construing the Texas interest statute phrase *ascertaining the sum payable* to refer to the sum a party executing a contract may be reasonably expected to pay, in view of all the circumstances, if at any time he becomes liable to pay; and it is not necessary that the contract establish a fixed liability in a definite amount as of a certain date, if liability can be ascertained with reasonable certainty. *Federal Life Insurance Com-*

*pany of Chicago* v. *Kriton,* (1923) 112 Tex. 532, 249 SW 193.

For all of the reasons above, the Court of Appeals in these cases correctly disregarded the City of Texarkana case.

**(C) The Kishi Case.**

In its petition, Phillips has failed to come to grips with the principle and controlling case in these cases. *Kishi* v. *Humble Oil and Refining Company,* 10 F2 356 (5th Cir., 1926). In *Phillips Petroleum Company* v. *Adams,* 513 F2 355, 367, the Court of Appeals has characterized the Kishi case as "a similar, and more venerable precedent". In the belief that a further factual statement concerning the Kishi case would unduly lengthen this brief in opposition, Respondents refer to the factual analysis of the case set forth in the Court of Appeals' opinion in the Adams case at page 367. The Kishi case has not been overruled by any Court, nor has a contrary rule been established by any Texas Court with respect to the right of one in Respondents' position to recover interest for the use of money. It cannot be legitimately argued that any of the cases cited by Phillips, and in particular *City of Texarkana* v. *Arkansas Louisiana Gas Company, supra,* overrules or is in conflict with the Kishi case. In order to demonstrate again that the Kishi case is controlling law in these cases, it is helpful to parallel the facts of the Kishi case with the facts in these cases.

(i) *The Adverse Claims*:

In the Kishi case, Kishi and Lang on the one hand, and Chesson on the other, were rival claimants to the title to a small tract of land and to the royalties on oil

and gas produced therefrom by Gulf and Humble, their respective lessees.

In these cases, and until October 28, 1972, the date FPC Order 586 became final, the adverse claimants to the principal fund were Petitioners on the one hand and Phillips' third party interstate pipeline purchasers on the other.

(*ii*) *The Stakeholders:*

In the Kishi case, the stakeholders were lessees under oil and gas leases executed by rival title claimants.

In these cases, Phillips is the stakeholder as purchaser under natural or casinghead gas purchase agreements.

In both cases, the holder was a stakeholder, having no ownership in the fund and having an obligation to deliver it up upon final determination of ownership between the rival claimants.

(iii) *Nature of the Disputed Funds*:

In the Kishi case, the funds accrued month by month from production and sale of oil and gas.

In these cases, the funds likewise accrued month by month from the production and sale of gas and casinghead gas, and represented the difference between the then area rate and the effective contract rate being received by Phillips in the Panhandle Field of Texas.

(*iv*) *Vehicle Implementing Accrual.*

In the Kishi case, the funds accrued in the hands of the stakeholders, Humble and Gulf, by virtue of express contract. Both lessee and rival claimants entered into an agreement that both lessees were to proceed under their respective leases; and when the Court,

in another suit, determined the title question, an accounting would be had for production accruing in the meantime, with the rival claimant determined to be the owner of the land. Until title was determined in the pending suit, neither of the rival claimants had any right to possession of the funds.

In these cases, Phillips claims to hold funds under authority of case law, *Ashland Oil and Refining Company v. Staats, Inc.*, 271 F. Supp. 571 (D Kan., 1967) (pages 5 and 6 of Appellee's brief in the Court of Appeals). Under that theory, the rival claimants had no right to possession of the funds until the October 28, 1972 affirmance of the FPC's Order 586 allowing the excess rates.

Stated more briefly, in the Kishi case the funds became due and payable to the rival claimant determined to be the owner by judgment in a separate title suit, and in these cases they became due and payable to the rival claimant determined to be the owner by final order of an administrative body.

(*v*) *Use Made of the Funds.*

In the Kishi case, the Court held that the stakeholders had the use of the funds because they kept them.

That is precisely what Phillips did in these cases. It had the use of the funds because it kept them, and at page 28 of Appellee's brief filed in the Court of Appeals, it is admitted that, "the actual cash received was not segregated, but became a part of all the cash in use by Phillips for its corporate purposes. . ."

Since Phillips did not segregate the funds received under its refund obligation filed with the FPC, but used

them for corporate purposes, it is responsible to Respondents for the value of that use, six percent (6%) interest, for the same reason that the stakeholder in the Kishi case was liable.

(*vi*) *Options Available to the Stakeholder.*

In the Kishi case, the Court observed that if the stakeholder had not wished to use the money, and thus be liable for interest, they could have deposited the principal sum in the registry of the Court

That option, among others, was available to Phillips in these cases Phillips could also have placed the money in an interest bearing account (albeit no legal obligation to do so existed), or paid such money to Petitioners under the same type of refund obligation which Phillips had filed with the FPC (a course which the Court of Appeals noted that Phillips had followed in other instances. (Adams case page 366) The option elected by Phillips was to keep the money and use it for its own corporate purposes; and having done so, it became liable for interest on such funds in an amount equal to legal interest, computed month by month as the funds accrued.

(*vii*) *Due and Payable.*

The money held by the stakeholder in the Kishi case became due and payable either to Kishi and Lang on the one hand, or Chesson on the other, month by month as it accrued from royalties under the provisions of the oil and gas lease contracts; however, it did not become due and payable in the sense that either was entitled to possession, until final judgment in the title suit, in accordance with the agreement of all parties. In these cases, the funds became due and pay-

able, in the same sense, to either Respondents on the one hand or to Phillips' third party purchasers on the other, as the same accrued under the applicable gas purchase contracts; but, as in the Kishi case, they did not become due and payable in the sense that either adverse claimant was entitled to possession of them until affirmance of the FPC's rate order on October 28, 1972.

Based upon the foregoing analysis of the authorities, it is clear that the Kishi case is the controlling case law in these cases and not those cited by Phillips, which do not pertain to the obligation of a stakeholder to pay interest when he has elected to follow an option to use the funds for his own purposes at the expense of the party ultimately determined to be entitled to the funds.

The doctrine of stare decisis is peculiarly applicable in matters of statutory construction. When a statute has been construed by a court of final resort, the fact that the legislature lets it stand through one or more subsequent sessions, without amendment, may be regarded as legislative sanction of the construction. The rule will apply even more forcibly where the statute is reenacted or incorporated in a revision without substantial change. *International Traveler's Ass'n.* v. *Bettis,* 120 Tex. 67, 37 SW2 1040, 1043 (1931); and when construed by an appellate court (although not of last resort) legislative acquiescence therein may be presumed from protracted failure to amend the statute. *State* v. *Hatcher,* 52 SW2 794, 799 (Tex. Civ. App., Austin, 1932), reversed on other grounds, 81 SW2 499.

Since the Fifth Circuit decided the Kishi case in 1926, the Texas Legislature has met every other year

during odd numbered years, and the Texas interest statute has been reenacted in several instances in substantially the same form. It was last reenacted by the 60th Legislature, Acts of 1967. The foregoing rules of statutory construction require that the Court conclude that the legislature was cognizant of the construction of the Texas interest statute by the Fifth Circuit Court of Appeals in the Kishi case and acquiesced therein.

**(D) Rules of Decision Act:**

Phillips asserts that these cases involve the Rules of Decision Act, 28 U.S.C.A. § 1652, and the principles of *Erie Railroad Company* v. *Tompkins,* 304 U.S. 64, and, under "Reasons for Granting the Writ" (Pet. 7), argues that the Court of Appeals refused to follow the interpretive criteria used by the Texas courts in determining when interest is to be paid. The Court of Appeals did not so refuse. It gave to each of the Texas cases cited by Phillips an interpretation, as applied to the facts in these cases, which is different from Phillips' interpretation. This Court has made it clear that in the very nature of things it must rely primarily on the Courts of Appeal for interpretations of local laws; and, where questions of local law are raised, and such questions have not been determined by a Court of Appeals, the case will be remanded to the Court of Appeals for such a determination. *Hillsborough* v. *Cromwell,* 326 U.S. 620. This, of course, is because the local federal courts are versed in the local law within their respective jurisdictions and are competent to speak on such local laws. There is no necessity in these cases for a further review by this Court of the Texas cases cited by Phillips and as applied in these cases. That function has already been fully performed by the Court of Appeals.

## CONCLUSION

It is respectfully submitted that the petition for certiorari should be denied.

Respectfully submitted,

R. C. HAMILTON
KOLANDER, TEMPLETON & HAMILTON
1800 American National Bank Building
Amarillo, Texas 79101

*Attorneys for Respondents J. H. Adams, et al, and First National Bank of Borger*

ROBERT J. HEARON, JR.
GRAVES, DOUGHERTY, HEARON, MOODY & GARWOOD
P. O. Box 98
Austin, Texas 78767

PAUL H. SMITH
COX, SMITH, SMITH, HALE & GUENTHER
500 National Bank of Commerce Building
San Antonio, Texas 78205

MASTON C. COURTNEY
CULTON, MORGAN, BRITAIN & WHITE
P. O. Box 189
Amarillo, Texas 79105

*Attorneys for Respondents Riverview Gas Compression Company, et al*